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Centre for Research in Education Inclusion and Diversity

CREID BRIEFING 45

Autonomy, Rights and Children with
Special Needs: A New Paradigm?

The Rights of Children with Special and Additional Support Needs in England and Scotland

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Introduction

This executive summary presents the key findings of a recently concluded research study by a team based at the Universities of Edinburgh and Manchester into the implementation of important new rights and duties concerned with decisions about the education of children with special educational needs and disabilities (England) or additional support needs (Scotland). The research was funded by an Economic and Social Research Council award (Ref. ES/POO2641/1).

The Children and Families Act 2014 part 3 (England) and the Education (Scotland) Act 2016 contain key provisions aimed not only at ensuring that the views of the child or young person with SEN/ASN inform decisions by those responsible for meeting their educational needs, and local policy, but also that older children enjoy autonomy as rights holders and participants in a range of processes including those concerned with planning their provision and seeking redress. The legislation holds out considerable promise of ensuring that the child's or young person's voice is central to decision-making in this field. Our over-arching research question was: Are we witnessing a new paradigm in education of children with SEN/ASN based on the principles of autonomous rights?

Research Overview

This research investigated the way in which the children's rights agenda is being implemented in practice in the field of SEN/ASN, taking into account the wider policy context of declining budgets, reduced local authority power, increasingly complex governance arrangements and policy divergence across England and Scotland.

The project's specific objectives were to analyse:

- The extent to which children (defined here as those aged under 16) and young people (those aged 16–24 inclusive) with SEN/ASN are able to realise their participation rights effectively;
- The degree to which the autonomy rights of such children and young people intersect with those of parents/carers and are driven by, or influence, the decision-making of schools and local authorities;
- The way in which capacity for autonomous decision-making is understood and acted upon in different social contexts;
- The factors which promote or inhibit the realisation of autonomy rights by children and young people with SEN/ASN, including those who are looked after by the local authority;
- The impact of a children's rights-based approach on the broader education and social policy landscape.

The research adopted a mixed method approach which included an analysis of policy, legislation and administrative data, a comprehensive, online survey of all local authorities in England and Scotland, semi-structured interviews with a wide range of professionals working in this field, and 36 detailed case studies (18 in each jurisdiction) of individual children/young people across six local authority (LA) areas (three English and three Scottish).

Key Findings

Analysis of Administrative Data

Analysis of administrative data suggests that there are important differences between England and Scotland with regard to the identification of children with SEN and ASN and the provision of statutory support plans.

Scotland has seen a large increase in the categories of children deemed to have additional support needs and identifies more than a quarter (and in some LAs more than a third) of the pupil population as having ASN. Children with English as an additional language are included under the umbrella of ASN, although the majority of these children do not have cognitive, physical or sensory difficulties. In England, one in seven pupils is identified as having SEN and although the proportion has increased very slightly in the past couple of years it has fallen every year before then since 2010.

In Scotland, a greater variety of plans are in use (CSP, IEP, Child Plan and other) compared with England (education, health and care plans (EHCPs) and SEN support).

Children are about six times more likely to have a statutory support plan in England (2.9% of the total pupil population) compared with Scotland (0.3% of the total pupil population).

In England the number of appeals registered by the First-Tier Tribunal (Health, Education and Social Care Chamber) increased from 3,712 (2015–2016) to 5,679 (2017–18). In Scotland the number of appeals registered by the ASN Tribunal increased from 62 (2015–16) to 92 (2017–18). Per head of population there were five times as many tribunal appeals in England than in Scotland.

Scotland appears to be phasing out statutory support plans, and children living in the most deprived areas are less likely to receive such plans than those in the more advantaged neighbourhoods. By way of contrast, in England, the proportion of pupils with a statutory support plan – in the form of an EHCP – is increasing. England's and Scotland's policies, or at least their effects as reflected in official statistics, appear diametrically opposed.

Legislative and Policy Frameworks

The law and policy governing special education in England and Scotland have evolved considerably since the 1980s and especially since the turn of the century.

Following the implementation of the Children and Families Act 2014 Part 3 and the Education (Scotland) Act 2016, respectively, the English and Scottish legislative frameworks now reflect a clear commitment to ensuring that children and especially young people have an autonomous voice in special needs decision-making. In both nations children and young people are given the right to information, advice and support, to have their voice heard in decisions on ASN/SEN assessments and support and to be involved in resolving disagreements. However, the more bureaucratic framework under the English legislation has led to young people's rights in England being more fully prescribed than in Scotland.

Young people aged 16 or over in both jurisdictions now have all same rights that parents of children hold. However, Scottish legislation appears to be more progressive than its English counterpart by giving children with ASN aged 12–15 who are deemed to have

capacity effectively the same rights as parents and young people. In England, rights conferred on children are more limited.

The Views of the Key Informants

In both jurisdictions, professional perspectives provided by key informants tended to be optimistic about the new emphasis on children's rights. They also highlighted a number of complex issues and competing interests that surround supporting cultures of co-production and greater engagement of children and young people in respect of new legal policy frameworks.

In Scotland, concerns were expressed by key informants that assessments of capacity and wellbeing may present obstacles to the exercise of children's rights. Concerns were also expressed that the new emphasis on children's rights might be associated with a downplaying of parents' rights.

Many respondents also remarked on the low level of awareness of the legislation in school and among parents of children with ASN. They also found the legislation unnecessarily complex and drew attention to widespread difficulties around understanding of the qualification criteria. LA informants questioned the relevance of CSPs in the light of the work involved and the decline in the number of children qualifying for one, as public sector cuts have led to a reduction in one-to-one services.

While far more children from poorer backgrounds are identified as having additional support needs and require extra resources to benefit from education, statutory support plans are disproportionately allocated to those in the most affluent areas. Some key informants pointed out that children identified with social and emotional behavioural difficulties, who tend to be predominantly from poorer backgrounds, are often accorded little respect in the classroom and are unlikely to have their wishes taken into account when alternative placements are being sought following exclusion.

In England, although LAs appear to be making efforts to engage with children and young people in the key assessment and planning processes, we identified only a small degree of change to date in participation and engagement and their impact on decisions. A number of informants indicated that the agency of children and young people continues to be rooted in the involvement of their parents and carers.

The intervention and support of school staff and especially SENCOs in both supporting assessment requests and reviewing EHCPs appears to be particularly helpful when ascertaining and presenting the views of children and young people. Parents also appear to be more likely to draw on support offered by education professionals who have existing relationships with their child than engage with independent advocates who may not understand their child's needs as well.

Key informants highlighted tensions when there is a conflict between a parent's and child or young person's wishes and it would appear that there continue to be risks that a parent's view may be accorded more weight than their child's.

Professionals commented that in cases of redress processes there appears to have been little progress in bringing the views, wishes and feelings of children and young people into consideration or of any markedly greater weight being accorded to them than previously. However, mediators and tribunal judges do seem to be committed to engaging with

children and young people's views, wishes and feelings when children and young people are supported to articulate them.

The Role of the Local Authority

In both Scotland and England, LAs responded positively to the potential of the respective sets of reforms to make a difference in the advancement of children and young people's rights. In both nations, services have been put in place to help children and young people realise their rights. However, many local authorities also acknowledged that there is still a long way to go before the relevant requirements of the new legislative framework, and the underlying policy objectives, are fully realised and engrained into routine practice. Progress towards the consistent implementation of respective reforms appears to be unevenly distributed and is particularly slow to take effect in Scotland.

Overall, the legislation in England places greater responsibility on local authorities to provide accessible information and support for children and young people with SEN and their parents than in Scotland. In England, information, advice and support is provided on a local basis to children and young people with SEN and disabilities (SEND) and their parents by SENDIAS. Support services in Scotland are delivered at national rather than local level, and although local authorities have a legal responsibility to inform parents, young people and children about these services most do not do so.

One area of advance in England has been engagement with children and young people through consultations about local provision and the local offer. Consultation with children and young people regarding local SEND provision is widely seen by LAs as beneficial in terms of improving policy and practice.

Whilst the majority of LAs considered that children and young people's participation in assessments and reviews of individual support plans was important, in both jurisdictions, respondents indicated that this does not always happen. Survey responses revealed sub-optimal levels of children's and young people's participation in EHCPs and CSPs.

Authorities reported that systematically involving children and young people in both consultations about local provision and in decisions about their own education and enabling their independent voice to be heard and properly considered required a considerable investment of time and resource. LAs in both jurisdictions conveyed a very clear message about not being sufficiently well resourced to implement reforms; especially in relation to managing increases in the volume, complexity and scope of ASN/SEND related workloads.

In Scotland, there also appears to be a need to reinforce the duties of local authorities to assess ASN and open CSPs in order to ensure that children and young people are able to access the additional resources required to meet their needs and the means of redress.

Case Study Analysis

Analysis of 36 in-depth case studies indicated that there is a wide range of intersecting factors and complex issues affecting the extent to which children and young people with ASN/SEND are able to access and realise their participation rights effectively regardless of the LA or jurisdiction in which they reside. A number of important factors appear to influence children and young people's ability to understand and realise their rights:

- their maturity, disposition and capacity;
- their relationships and family dynamics;

- their and their family's access to resources and knowledge of rights;
- the attitudes of professionals and initiatives which help to build children and young people's capacity;
- their prior experience, if any, of collective participation.

Children and young people tended to have a broad idea of the abstract concept of rights and some demonstrated understandings of their right to have their views and feelings respected.

The case studies highlighted that children and young people with ASN/SEND are not always afforded an equality of opportunity in being informed about their rights or to participate in discussions and decision-making processes regarding education and support.

Both north and south of the Border, there were difficulties ensuring participation rights of children with complex needs. Schools were often successful at listening to and acting on children's wishes when these were expressed verbally and in a manner deemed acceptable to the school, but they were much less adept in interpreting non-verbal messages, particularly when expressed in a manner which disrupted normal classroom activities.

The vast majority of children and young people relied heavily upon their parent's or carer's access to sufficient information and support in order to realise their rights, and parents and carers very often advocated on behalf of their child. This underlined the importance of ensuring that children with ASN/SEND who are also looked after by the local authority are able to access a comparable level of support from care professionals and independent advocacy services.

Families living in areas with a high level of deprivation or who have limited time and access to other resources are particularly likely to rely upon the expertise of professionals involved in their child's care to access information about SEND matters and their rights. Children and parents from socially disadvantaged backgrounds were also more likely to feel ignored and disrespected.

In Scotland, parents experienced difficulties in ensuring that local authorities fulfilled their legal responsibilities, for example, in providing CSPs for children fulfilling the relevant criteria and ensuring that these documents were monitored and reviewed.

In England, just over half of parents and carers were not aware of the local offer, and of those that accessed it, very few found this a particularly useful source of further information and support.

In relation to practice in schools and classrooms, there appear to be more similarities than differences between England and Scotland. In both nations there is evidence of success in creating inclusive classroom environments where children's voices are routinely listened to on everyday schooling matters. Children, parents and teachers generally believed that children's voices were heard in school and there appeared to be broad support for children's rights in principle across both jurisdictions. However, some teachers expressed reservations about allowing children autonomous rights and some believed children's rights had 'gone too far'.

In relation to dispute resolution, evidence from our case studies suggests that there is much work still to be done in order to fully include and support children and young people to participate at a meaningful level in the relevant processes..

Conclusion

- In both jurisdictions, there appears to be broad support for children's rights of participation. However, our research suggests there is a gap between rhetoric and reality and there appears to be much work that needs to be done before policy aims and ambitions are translated into everyday practice and these are applied consistently across different educational settings and authorities in each jurisdiction.
- Whilst there appear to be some positive steps forward being made in terms of engaging children and young people in consultations about local SEND provision in England, this research has identified a number of important issues which impede the extent to which children and young people in both jurisdictions are able to access adequate support and information in order to participate at a meaningful level in decisions about their individual educational planning and support and in processes of dispute resolution.
- Local authorities in both England and Scotland are sympathetic to the broad aim of enhancing children's rights. However, in a context of squeezed budgets, they have been slow to produce resources aimed at children and young people, ensure that advocacy services are available for all those who need them and provide training for school and local authority staff. This implies that in both jurisdictions, it is important to ensure that current levels of SEN/ASN spending are maintained or increased. Scottish LAs also need to ensure that all staff understand the importance of statutory support plans as a means of upholding the rights of children with ASN and their parents. They need to ensure that LA staff understand their legal duties and take action to counter the ongoing decline in the use of CSPs.
- Issues surrounding professionals' access to resources sufficient to ensure a consistently person-centred approach to the planning and delivery of ASN/SEN processes alongside other competing institutional demands and increasing workloads limit the extent to which children and young people are supported to achieve greater autonomy in these contexts. Schools also have a particularly important role to play in the realisation of the rights of children with SEN/ASN. In England and Scotland, it is evident that not all practitioners have a good understanding of the new legislation, and further in-service training is needed.
- The levels of autonomy that children and young people are afforded by both parent/carers and professionals are also sometimes limited by a lack of clarity with regard to responsibility for ascertaining participatory capacity at a number of different levels of decision-making. There are also persistent difficulties in ensuring participatory rights of children with complex needs, particularly those from socially disadvantaged backgrounds and those with significant learning and communication difficulties, particularly if they have little or no speech.
- Parents and carers continue to act as children's principal advocates and subscribe to the idea of children's rights, but quite rightly recognise that they have a crucial role in ensuring that the decisions made are in the best interests of their child. It is important that parents and carers allow their children as much freedom as possible to engage in

the decision-making process, including attending meetings and expressing their views through a variety of means.

- Parents and carers from socially advantaged backgrounds appeared to be more effective in mobilising external support and navigating a very complex system, although this is not always the case. Parents from less advantaged backgrounds, whose children were often disproportionately identified with social, emotional or behavioural difficulties, often felt adrift in the system and were unable to advocate effectively for their children. It is important therefore, that professionals make extra efforts to engage with those they may regard as 'hard to reach'.
- We have identified something of a paradox, in that stronger children's rights legislation in Scotland has not obviously led to a greater degree of empowerment for children and young people. The contrast with England is at least in part due to the existence of a more tightly regulated planning system there leading to greater involvement of children and young people in formal processes.
- Scotland, has adopted a somewhat laissez faire approach to the use of statutory support plans. The over-complex and opaque system north of the border allows local authorities to pursue an idiosyncratic approach, whereby types of plan have proliferated with little effort to explain the increasingly diverse system to children and young people or their parents. As a result, statutory support plans have become almost obsolete, only accessible to the most determined and best-informed parents. In light of the declining use of statutory support plans, the Scottish Government needs to review the criteria for opening a coordinated support plan and ensure that local authorities are undertaking their legal duties. By way of contrast, England's growing use of EHCPs and an increased level of demand for local authority assessments means that children and young people are much more likely to be involved in formal planning processes, although this does not guarantee that they are always able to access and utilise their participation rights. Indeed, sub-optimal levels of participation were identified in a range of contexts.
- In both jurisdictions, children and young people are enthusiastic about the rights agenda, and need to be helped by the adults around them to be as active as possible in engaging in decisions on future plans for their education. In particular, their capabilities need to be maximised, but taking account of the need to adjust expectations as to autonomy in line with their capacity, which needs to be properly assessed, and ensure that the level of responsibility placed upon them is appropriate to their development, understanding and level of vulnerability.
- Given the risk that the autonomy rights of children and young people may intersect and overlap with those of their parent or carer, as well as possible disparities between the ways in which different professionals and institutions support children and young people's autonomy in decision making, the need to ensure that children and young people are made aware of their rights and are adequately supported to realise them independently becomes ever more pressing.

Further information

All working papers and briefings of this project **Autonomy, Rights and Children with Special Needs: A New Paradigm?** (Ref. ES/P002641/1) are available at <https://www.ed.ac.uk/education/rke/centres-groups/creid/projects/autonomy-rights-sen-asn-children> and on the website of the Centre for Research in Education Inclusion and Diversity (CREID) at the University of Edinburgh (www.creid.ed.ac.uk).

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